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IN THE

Supreme Court of the United States**October Term, 1991****GEORGE KLEINMANN,***Petitioner,**against*

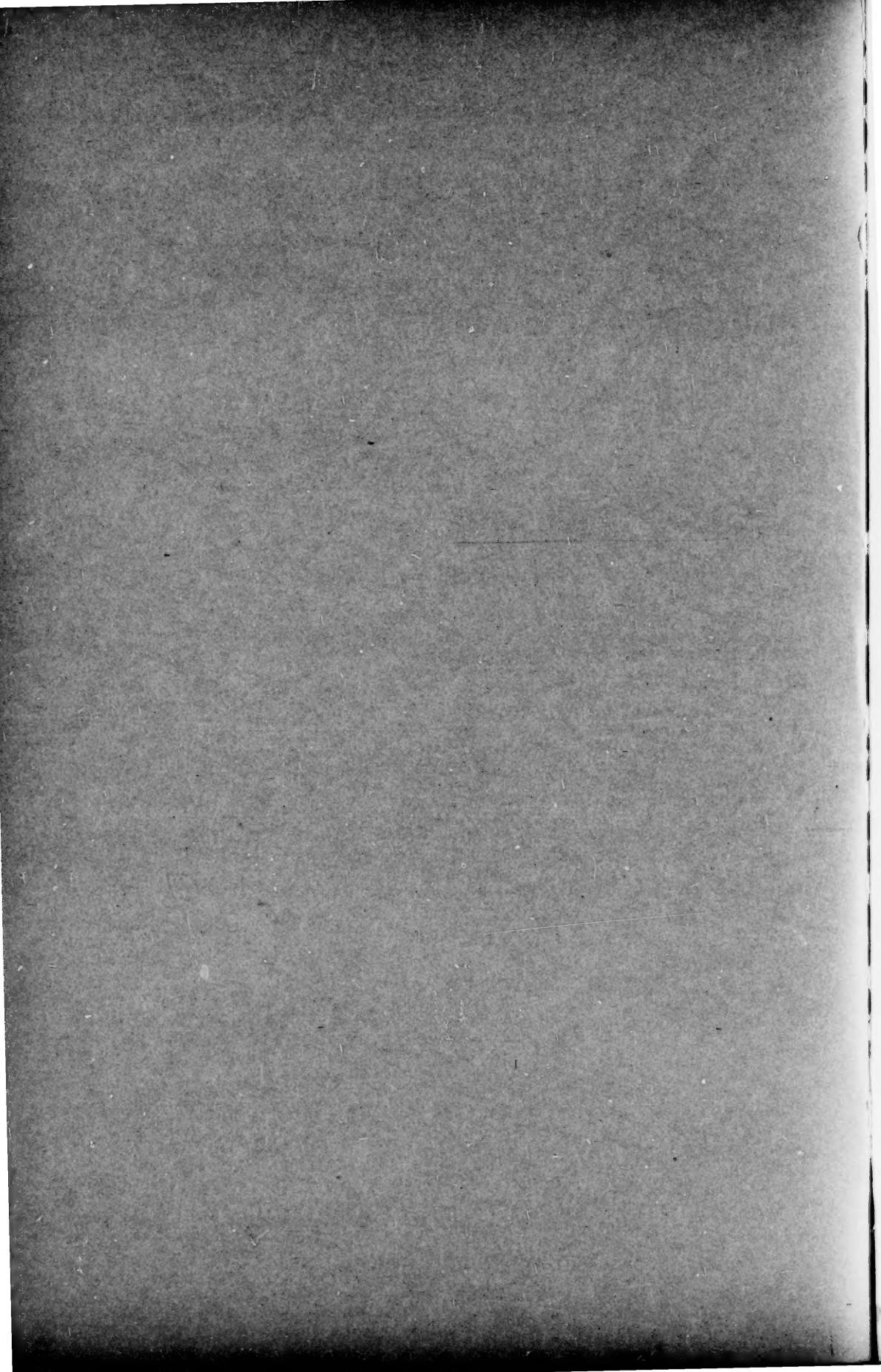
MARIO CUOMO, as Governor of the State of New York, THE
STATE OF NEW YORK and ARTHUR Y. WEBB, as Com-
missioner of the New York State Office of Mental Retarda-
tion and Developmental Disabilities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

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York, Attorney for Respondents***The Capitol****Albany, NY 12224****(518) 474-8101****JERRY BOONE****Solicitor General***PETER H. SCHIFF***Deputy Solicitor General***LEW A. MILLENBACH***Assistant Attorney General**Of Counsel****Counsel of Record****Dated: January 8, 1992**



i.

Counterstatement of Question Presented

Whether the court below properly decided this case in accordance with accepted federal law and procedures.

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No. 91-775

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

GEORGE KLEINMANN,

Petitioner,

against

MARIO CUOMO, as Governor of the State of New York, THE
STATE OF NEW YORK and ARTHUR Y. WEBB, as Commis-
sioner of the New York State Office of Mental Retardation
and Developmental Disabilities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari seeking to review the actions and opinion of the United States Court of Appeals for the Second Circuit. The actions of the Court of Appeals were in all respects proper, and the Court of Appeals' opinion does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Counterstatement of the Case

This action was commenced on April 17, 1987, in the United States District Court, Northern District of New York against the Governor of the State of New York and the former Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") premised upon a claim that the petitioner was laid off because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). 29 USC § 621 *et seq.* Further, the petitioner alleged that the respondents' actions in reassigning him to his former supervisor caused him to suffer severe physical and emotional anxiety, that respondents' failure to accommodate his disability violated the Rehabilitation Act of 1973 (29 USC § 706), and that his subsequent layoff was in retaliation for a claim of discrimination which he had made to OMRDD and to the EEOC (A366-A387).¹

The case came on for trial without a jury before Hon. Con G. Cholakis, District Judge. The court dismissed the Rehabilitation Act claim at the close of petitioner's case (A574).

After the testimony of respondents' witnesses and rebuttal testimony by petitioner, the court rendered a bench decision on June 13, 1989, dismissing the complaint in its entirety (A2-A14). In ruling as it did the District Court found that the respondents "established a legitimate non-discriminatory reason for the [petitioner's] discharge which the [petitioner] has not proven was a pretext for the [alleged] discrimination" (A13).

Petitioner appealed and the matter was fully briefed and argued before a panel of the United States Court of Appeals for the Second Circuit. By a summary order filed on January

¹ Unless otherwise noted, numbers in parentheses preceded by the letter "A" are references to the pages of the Appendix to the petition.

18, 1990, the court remanded the case to the District Court for findings of fact and conclusions of law as to petitioner's cause of action alleging retaliation, particularly with regard to a claim by him that he was refused permission "to accept on April 7, 1983 a position that OMRDD allegedly offered him on March 18, 1983" (A16). The Court of Appeals retained jurisdiction of the matter.

By decision dated June 20, 1990 the District Court issued its findings of fact and conclusions of law (A18-A29). As relevant, the District Court found that the petitioner's line item number and title had been identified for abolition before the petitioner filed a charge of age discrimination and that the abolition of his position was therefore not in retaliation for such charge (A23-A25). The court found additionally that the petitioner's failure to obtain the position allegedly offered to him on March 18, 1983 was due to his own indecision and was not an act of retaliation by officials at OMRDD (A26).

The case was again fully briefed by the parties and was resubmitted to the Court of Appeals without oral argument. By a summary order dated January 3, 1991, the Court of Appeals affirmed the judgment of the District Court (A30-A35). As relevant, the court ruled that there was ample evidence in the record to show that petitioner's position had been abolished, and that the District Court did not commit error in relying on that evidence (A33). The Court of Appeals ruled additionally that the District Court properly considered whether the circumstances showed that age was a factor in petitioner's discharge, that there was ample support in the record for the District Court's finding that petitioner was denied the position offered to him on March 18, 1983 because he failed to accept it until after the offer was withdrawn, and that the District Court did not erroneously hold that petitioner's employer's compliance with the New York State Civil Service Law insulated it from liability under the ADEA (A33-A34).

Petitioner subsequently filed a petition for reargument which was denied by the Court of Appeals in an order filed February 27, 1991 (A36-A37). Quite contrary to petitioner's assertions in his petition for a writ of certiorari (Petition, pp 5, 40-42), an examination of the Court of Appeals' order reveals quite clearly that the court treated the petitioner's motion as one for a rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40, and denied it as such (A36), and did not treat it simply as a suggestion for a hearing or rehearing in banc, made pursuant to Federal Rules of Appellate Procedure, Rule 35 (A37). Petitioner now seeks a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

1. The Second Circuit did not sanction a departure from the accepted and usual course of judicial proceedings.

The petitioner contends at Point I of his brief that the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings in six respects, thereby warranting intervention by this Court. In fact, the practices and procedures followed by the Court of Appeals were entirely proper, as the following discussion will demonstrate. We will address the petitioner's arguments *seriatim*.

A. The petitioner argues first (Petition, pp 26-30) that the District Court improperly denied a request by him, made at the close of his case, for a continuance for the purpose of obtaining other counsel. This argument is raised for the first time in this Court and was not addressed to the Court of Appeals notwithstanding the fact that petitioner's current counsel fully briefed this matter the second time it was presented to the Court of Appeals. Under these circumstances, we submit that any complaint which the petitioner may have had in regard to the denial of his request for a continuance has been waived and

cannot properly form the basis of a review by this Court. Cf. *Cardinale v. Louisiana*, 394 US 437, 439 (1969).

Moreover, an examination of the relevant transcript pages (A501-A514) reveals that the District Court carefully questioned the petitioner concerning the reasons why he wished to obtain other counsel and denied the request for a continuance only after it became obvious that no valid reason for the requested delay existed. Given the fact that at the time the request was made virtually the whole of the petitioner's case had been presented, and that the petitioner was unable to articulate any good reason why the request should have been granted, we submit that the District Court did not act improperly in denying petitioner's request for a continuance and that further review based upon this ground is not therefore warranted.

B. The petitioner argues next (Petition, pp 31-38) that certiorari is warranted because one of the District Court's law clerks was married to an attorney who was employed by the New York State Attorney General's office during the time that the trial of this matter was being conducted before the District Court. Although this fact was known to petitioner's current counsel before the matter was presented to the Court of Appeals for the second time (Petition, pp 31-32), this argument was not raised in the Court of Appeals and is presented in this Court for the first time. We submit that under these circumstances the issue is not ripe for review by this Court and that the petitioner has waived any argument which he might have had in regard to the issue. And this is especially so since the petitioner has not presented the slightest proof that the law clerk referred to worked on this matter during the time she worked for Judge Cholakis, or that she even discussed the matter with her husband. Therefore review by this Court based upon this argument is not warranted.

C. The petitioner's third contention (Petition, pp 39-40) is that the District Court failed to accord any weight to a finding of violation by the EEOC and that by failing to explain why it declined to accord any weight to the decision the District Court effectively precluded the petitioner from attaining a complete and proper appellate review. On the second occasion that this matter was presented to the Court of Appeals, the petitioner argued that the District Court erred in failing to accept the decision of EEOC that a violation of ADEA had occurred. Respondents vigorously resisted this argument, noting that a finding of violation by the EEOC is not binding upon the courts and that a trial *de novo* on the issue is required. *Johnson v. Univ. of Pittsburgh*, 435 F Supp 1328 (DC Pa 1977). Therefore, contrary to the petitioner's assertions in his petition for a writ of certiorari, this issue was fully presented to the Court of Appeals, which had every opportunity to consider the parties' arguments and to assess the propriety of the District Court's decision in light of those arguments. The mere fact that the petitioner is unhappy with the manner in which the Court of Appeals decided the issue does not present a valid ground for review by this Court.

Moreover, the very fact that the District Court engaged in an examination of the respondents' evidence notwithstanding its express finding that that scenario described by the petitioner did not necessarily give rise to an inference of age discrimination (A11), provides strong inferential evidence that the District Court did accord some weight to the decision by EEOC. Under these circumstances, the granting of certiorari based upon this ground is not warranted.

D. The petitioner's fourth contention (Petition, pp 40-42) is that the Court of Appeals failed to render a decision with respect to his motion for reargument, thus warranting intervention by this Court. As we have pointed out in the Counterstatement of the Case (*ante*, p 4), the petitioner is incorrect in his assertion that the Court of Appeals did not issue a ruling with

regard to his motion for reargument. An examination of the Court of Appeals' order reveals quite clearly that the court properly treated the petitioner's motion as one for a rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40, and decided it as such, and did not treat it simply as a suggestion for a hearing or rehearing *in banc* made pursuant to Federal Rules of Appellate Procedure, Rule 35 (A36-A37). Therefore, review by this Court based upon this ground is not warranted.

E. The petitioner's fifth contention (Petition, pp 42-44) is that following remand by the Court of Appeals, the District Court should not merely have rendered findings of fact and conclusions of law as to petitioner's cause of action alleging retaliation, as directed by the Court of Appeals (A15-A17), but should have conducted "a trial de novo" as to the correctness of the decisions made by the state agencies (Petition, p 43). Petitioner ignores that there had been a full trial and that the remand was for a limited purpose. In its order remanding the matter to the District Court, the Court of Appeals explicitly ruled that it would retain jurisdiction of the matter pending the issuance of findings by the District Court (A16). Therefore, the petitioner's assertion that a valid ground for intervention by this Court exists because the District Court did not go beyond the remand is totally without merit.

F. The petitioner's final contention (Petition, pp 44-46) is simply to the effect that the lower courts erred in concluding that the petitioner's position had been abolished because the petitioner's name and line item did not appear on a form which was introduced into evidence by the petitioner. However, as explicitly found by the District Court (A23), and as held by the Court of Appeals in its affirmance (A33), there exists ample other evidence in the record showing that petitioner's position had in fact been abolished. At base the petitioner is requesting this Court to intervene in this matter solely because he is unhappy with the manner in which the lower courts resolved

an issue of fact. That is not a proper subject for review by this Court, and certiorari based upon this ground should consequently be denied. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

2. The Court of Appeals decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Although asserting at Point II of his petition that the decision of the Court of Appeals is in conflict with the rulings of this Court and other Circuit Courts of Appeal concerning the issue of age discrimination, an examination of the petitioner's arguments in this regard reveals that the substance of his complaint is nothing more than that he disagrees with the factual conclusions reached by the lower courts concerning his claim that he was terminated from his employment because of his age. Such factual claims do not present a sufficient ground for review by this Court. *See, United States v. Johnston, supra; Graver Mfg. Co. v. Linde Co., supra.*

The record in this case reveals that the District Court correctly apportioned the various burdens of proof and persuasion among the parties as required by the cases and that the petitioner simply failed to meet his ultimate burden of proving that his employment was terminated because of his age. *See, Griggs v. Duke Power Co.*, 401 US 424 (1971) (once a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, business-related, non-discriminatory reason for its decision to terminate, or not to hire or promote him); *Texas Dept. of Community Standards v. Burdine*, 450 US 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973) (where the employer has produced evidence tending to meet that burden, the plaintiff must show that the reasons proffered by the

employer are merely a pretext to cloak a discriminatory motive).

In affirming the District Court's decision, the Court of Appeals concluded that there was ample evidence in the record to support the District Court's finding that the petitioner had not been the subject of discrimination and that the District Court did not commit any errors of law concerning its interpretation and application of ADEA (A30-A35). The petitioner has wholly failed to demonstrate in what manner the decision of the Court of Appeals conflicts with any decision of this Court or any other Circuit Court of Appeals, and has failed to come forward with any other good reason why review of the Court of Appeals' decision by this Court is warranted.² The petition for certiorari should therefore be denied.

²The petitioner's repeated reference to vacant, "funded", positions (Petition, pp 19, 21-22, 48), which he claims could have been eliminated, thereby effecting the same budgetary savings as were effected by reason of the abolition of his position, overlooks the fact that even though the positions were "funded", there was no actual expenditure of funds because they were vacant. Moreover, the positions referred to were located in a different layoff unit than that occupied by the petitioner, and were retained simply because the incumbents had received promotions and were entitled, under the law, to return to them at any time during their probationary period in the higher titles. New York Civil Service Law § 63.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
January 8, 1992

Respectfully submitted,

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York, Attorney for Respondents

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